No. 87-271

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In the Supreme Court of the United States

OCTOBER TERM, 1987

HARBISON-WALKER REFRACTORIES, A DIVISION OF DRESSER INDUSTRIES, INC., PETITIONER

v.

EUGENE F. BRIECK

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION AS AMICI CURIAE SUPPORTING RESPONDENT

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QUESTION PRESENTED

Whether a plaintiff who is contesting the termination of his employment in an action under the Age Discrimination in Employment Act of 1967, 29 U.S.C. (& Supp. III) 621 *et seq.*, may withstand the employer's motion for summary judgment by using the employer's post-termination actions to establish that the employer's proferred reason for the termination was a pretext for unlawful discrimination.

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INTEREST OF THE UNITED STATES AND THE EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

This case concerns the nature and extent of the plaintiff's evidence required to withstand a defendant's motion for summary judgment under the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. (& Supp. III) 621 *et seq.* The Equal Employment Opportunity Commission (EEOC) has responsibility for the administration, interpretation, and enforcement of the ADEA. In addition, the Attorney General and the EEOC have substantial responsibility for the enforcement of Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, upon which the ADEA is modeled. The federal government also is an employer subject both to the ADEA (29 U.S.C. 633a) and to Title VII (42 U.S.C. 2000e-16). Resolution of the issue here accordingly will affect the government's enforcement

efforts under the ADEA and Title VII, as well as the government's role in litigation under those statutes as a defendant.

STATEMENT

Petitioner is a producer of ceramic brick products. Until 1982, it employed respondent as a brick installation specialist. In July of that year petitioner laid off respondent, then aged 55, and another installation specialist, then aged 59. Approximately one month later, petitioner fired a third installation specialist, then aged 59. In November 1982 petitioner laid off its final installation specialist, Hugh Faust, then aged 39. Faust was recalled in July 1983. Respondent, pointing to his own discharge and to the subsequent recall of the younger Faust, then brought suit under the ADEA, alleging that petitioner had discriminated against him on the basis of age. Pet. App. 12a, 13a.

The district court granted petitioner summary judgment (Pet. App. 12a-21a).[1] The court found that respondent had made out a prima facie case of discrimination by demonstrating that "[h]e was 55 years old when he was laid off" and that "[h]e certainly was qualified to work as an installation specialist, the job now held by Faust, a younger employee" (*id.* at 15a). The court was persuaded, however, by petitioner's "explanation of its bona fide business reasons behind its action" (*ibid.*). As the court explained, "the chief reason for retaining Faust, according to [petitioner], was his experience as a sales correspondent. He thus was practiced in working with records and written reports, in customer relations, and in preparing bids and quotations." In contrast, respondent lacked experience in these areas. *Id.* at 15a, 16a.

[1] The court also rejected respondent's claims of breach of contract and tortious infliction of emotional distress (Pet. App. 17a-20a). Those rulings were affirmed by the court of appeals (*id.* at 6a-7a) and are not at issue here.

The court rejected respondent's "attempt to expose these alleged justifications as [a] pretext by coloring Faust's prior experience as unimportant" (Pet. App. 16a). The court noted that respondent did "not refute Faust's prior experience with office matters such as price quotations, customer contact, and setting priorities for orders from the manufacturing plant" (*ibid.*). And the court was unpersuaded by respondent's argument that Faust's experience as a sales correspondent was irrelevant because "Faust spends about three-fourths of his time on installation work" (*id.* at 16a-17a). In the court's view, "[a]ny question about the appropriateness of how Faust now spends his time edges into the area of judicial scrutiny of business decisions, which is not part of our function. We nonetheless consider it plausible that the importance of an employee's related experience, whether or not frequently applied, increases under the scaled-down business operations which in fact existed." *Id.* at 17a. The court therefore concluded that it could not "find that age was a determinative factor in the decision to lay off [respondent]" (*ibid.*). For that reason, the district court granted petitioner summary judgment.[2]

The court of appeals reversed, holding that the award of summary judgment to petitioner was improper (Pet. App. 1a-11a). The court found it undisputed that respondent had made out a prima facie case of discrimination (*id.* at 2a-3a). Conversely, the court noted that respondent "introduced

[2] The district court reaffirmed its decision on respondent's motion for reconsideration (Pet. App. 22a-25a), reiterating its view that, while respondent had made out a prima facie case, he had failed to demonstrate that petitioner's explanation of its action was a pretext for discrimination. The court opined that, "[i]n attempting to carry this burden, [respondent] failed to forge the critical link between [petitioner's] actions and [respondent's] age with *relevant* proof" (*id.* at 23a (emphasis in original)).

no evidence to counter the assertion that Faust's prior experience with office matters such as price quotations, customer contact, and setting priorities for orders from the manufacturing plan[t], distinguishes his qualifications from those of [respondent]" (*id.* at 4a). But the court found a disputed issue of fact concerning the question whether Faust's acknowledged office experience was the actual reason for his retention.

The court noted respondent's evidence that Faust spent some 75% of his time on installation work, and that "[t]he remaining time was spent preparing reports of installations, an activity performed by all installation specialists including [respondent], doing some filing and working on margins" (Pet. App. 5a). This evidence, the court found, "is inconsistent with [petitioner's] expressed need for diverse skills gained from Faust's marketing and sales experience. This evidence raises a question of fact as to whether the employer really believed that Faust's 'varied' experience made him more qualified than [respondent] to perform the job functions remaining in the reduced business environment." *Ibid.* The court added (*id.* at 5a-6a):

> if the jury finds that the asserted 'more varied' skills were neither employed nor required in the position for which Faust was preferred, the jury might find the employer's asserted reason for preferring Faust to be pretextual * * *. The district court erred in resolving this factual dispute. The question is not whether the employer's asserted reason is plausible, but whether there is also evidence of record which, if credited, could render the reason implausible.

The court of appeals also rejected the district court's suggestion that respondent's argument amounted to an attack on petitioner's business judgment. The court of appeals explained that "[t]he question on summary judgment is

whether evidence of the duties actually performed by Faust upon his recall could cast doubt on the [petitioner's] assertion that Faust was retained because of his more diverse skills. We find the answer to be in the affirmative." Pet. App. 6a. The court of appeals therefore reversed the grant of summary judgment and remanded the case for trial.[3]

SUMMARY OF ARGUMENT

The three-step framework for resolving ADEA actions, first set out in the Title VII setting in *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973), is familiar. The plaintiff begins by establishing a prima facie case; the burden then shifts to the defendant to proffer a legitimate, nondiscriminatory reason for its action. At the third stage of the *McDonnell Douglas* framework – the one at issue in this case – the plaintiff then is given an opportunity to show that the proffered reason is a pretext for discrimination. As the Court has expressly explained, a plaintiff may make this showing in one of two ways: "either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Texas Dep't of Community Affairs* v. *Burdine*, 450 U.S. 248, 256 (1981). The court of appeals here faithfully followed this approach. Reviewing the record, the court pointed to evidence that Faust spent only a small percentage of his time doing things that respondent was not trained to do. This evidence, the

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[3] Judge Weis dissented (Pet. App. 8a-11a). Noting Faust's superior skills as a sales representative, Judge Weis reasoned that "[o]ne must question * * * whether [respondent] has demonstrated the implausibility of the [petitioner's] asserted reasons for preferring Faust when [respondent] admits his skills do not match his rival's diverse abilities" (*id.* at 10a). Judge Weis therefore concluded that "a jury could not properly decide in the [respondent's] favor" (*id.* at 11a).

court explained, tended to show pretext because it "is inconsistent with [petitioner's] expressed need for diverse skills." The court therefore concluded that the evidence of Faust's actual duties could lead a jury to "find [petitioner's] asserted reason for preferring Faust to be pretextual." Pet. App. 5a.

Petitioner challenges the court of appeals' analysis by asserting that a plaintiff who has established a prima facie case in an ADEA action may rebut an employer's proffered, nondiscriminatory explanation of its actions only by offering evidence that *itself* directly tends to establish discrimination; petitioner contends that it is not enough for the plaintiff to show that the employer's stated explanation is unbelievable. This argument, however, is flatly inconsistent with *Burdine*'s conclusion that pretext may be established by showing that the "employer's proffered explanation is unworthy of credence." More fundamentally, petitioner's analysis cannot be squared with the logic of the *McDonnell Douglas* framework. Evidence establishing a prima facie case, if unrebutted by the defendant, entitles the plaintiff to summary judgment; if the plaintiff can show that the defendant's proffered explanation is unbelievable, he should be left, at the very least, in the same position that he would have been in had his prima facie case not been rebutted in the first place. Indeed, a showing of pretext should, if anything, strengthen the plaintiff's case, since a defendant who offers an unbelievable response to an accusation of discrimination is likely to have something to hide.

Petitioner also argues that evidence of the duties actually assigned to Faust after his recall should not have been considered by the court of appeals because that evidence goes only to the soundness of petitioner's business judgment. This argument is grounded on a misstatement of the use to which the disputed evidence was put. Respondent is not arguing that petitioner was *unwise* in thinking that it

would need an employee with training as a sales correspondent; respondent instead wants to use Faust's post-recall duties as evidence that petitioner *never* had any intention of using Faust as a sales correspondent. Since an employer's actual conduct surely sheds at least some light on its past intentions, there is no reason to deny a factfinder use of the sort of evidence offered by respondent here.

Petitioner's final argument—that the court of appeals departed from the summary judgment standards set out in Fed. R. Civ. P. 56—amounts to a quibble with the court of appeals' assessment of the facts of record. The court expressly found that respondent's evidence "raises a question of fact as to whether [petitioner] really believed that Faust's 'varied' experience made him more qualified than [respondent]" (Pet. App. 5a), and that this evidence might lead a jury to find that petitioner's proffered justification was a pretext for discrimination. The court below thus followed this Court's admonition that "summary judgment will not lie if a dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Whatever the merits of the court of appeals' assessment of the record, its legal analysis was entirely sound.

ARGUMENT

This is an unexceptional case. In finding an award of summary judgment inappropriate, the court of appeals properly judged the record here under the standard for resolving Title VII (and thus ADEA)[4] cases that has repeatedly been

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[4] "[T]he substantive provisions of the ADEA 'were derived *in haec verba* from Title VII' 'and apply with equal force.' " *Trans World Airlines* v. *Thurston*, 469 U.S. 111, 121 (1985) (quoting *Lorillard* v. *Pons*, 434 U.S. 575, 584 (1978)). As petitioner notes (Br. 12-13 n.5), the courts

applied by this Court. Petitioner's challenge to the holding below therefore amounts, at bottom, to a double-barreled attack on established Title VII doctrine and on the court of appeals' assessment of the facts of record in light of that doctrine. Both aspects of that challenge should be rejected.

1. This Court, in a series of cases beginning with *McDonnell Douglas Corp.* v. *Green,* 411 U.S. 792 (1973), has set forth the "allocation of burdens and order of presentation of proof in a Title VII case alleging discriminatory treatment." *Texas Dep't of Community Affairs* v. *Burdine,* 450 U.S. 248, 252 (1981). This three-step procedural framework has become familiar.

> First, the plaintiff has the burden of proving by the preponderance of the evidence a prima facie case of discrimination. Second, if the plaintiff succeeds in proving the prima facie case, the burden shifts to the defendant "to articulate some legitimate, nondiscriminatory reason for the employee's rejection." Third, should the defendant carry this burden, the plaintiff must then have an opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination.

Id. at 252-253 (quoting *McDonnell Douglas,* 411 U.S. at 802).

This Court also has fleshed out the nature of the inquiry at each step of *McDonnell Douglas* framework. As both courts below recognized, a plaintiff in an ADEA action may make out a prima facie case of discrimination by showing that he is in the protected class (that is, that he is between 40 and 65 years of age), that he was qualified for a given position, that he was denied the position (or subjected to

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accordingly have, with rare exceptions, applied the *McDonnell Douglas* framework in ADEA cases.

some other adverse personnel action), and that a younger person received favorable treatment vis-a-vis the same or an equivalent position. See *Burdine*, 450 U.S. at 253 & n.6; *McDonnell Douglas,* 411 U.S. at 802. Establishment of a prima facie case raises a presumption that the plaintiff was a victim of discrimination. See *Burdine,* 450 U.S. at 254. The burden then passes to the defendant to "produc[e] evidence that the plaintiff was rejected, or someone else was preferred, for a legitimate, nondiscriminatory reason" (*ibid.*). At this second stage of the process, "[t]he defendant need not persuade the court that it was actually motivated by the proferred reasons" (*ibid.*); the employer "need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus" (*id.* at 257). See *Board of Trustees* v. *Sweeney,* 439 U.S. 24, 25 n.2 (1978). If the defendant satisfies this burden, "the presumption raised by the prima facie case is rebutted" (*Burdine*, 450 U.S. at 255).

The case then moves to the third stage of the *McDonnell Douglas* formulation—the one directly at issue in this case—where the plaintiff is given "the opportunity to demonstrate that the proffered reason was not the true reason for the employment decision" (*Burdine*, 450 U.S. at 256). The plaintiff "may succeed in this either directly by persuading the court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence" (*ibid.*). See *United States Postal Service Board of Governors* v. *Aikens,* 460 U.S. 711, 716 (1983). A plaintiff thus may establish pretext within the meaning of *McDonnell Douglas* and *Burdine* simply by showing that the employer's proffered explanation is unbelievable: "the *McDonnell Douglas* framework requires that a plaintiff prevail when at the third stage of a Title VII trial he demonstrates that

the legitimate, nondiscriminatory reason given by the employer is in fact not the true reason for the employment decision" (*Aikens*, 460 U.S. at 718 (Blackmun, J., concurring)).

In this case, the court of appeals faithfully followed the approach set out in *McDonnell Douglas* and *Burdine*. It is conceded that respondent made out a prima facie case of age discrimination, and it is plain that petitioner offered evidence supporting a legitimate reason for its decision to retain (and then recall) Faust rather than respondent. Turning to the third step in the *McDonnell Douglas* framework, the court of appeals held that summary judgment for petitioner was inappropriate because "the record * * * contains 'evidence of inconsistencies and implausibilities in the employer's proferred reasons for discharge (which) reasonably *could* support an inference that the employer did not act for (those) nondiscriminatory reasons' " (Pet. App. 2a (citation omitted; emphasis in original)). In particular, the court pointed to evidence that Faust spent only a relatively small percentage of his time doing the things that respondent was not trained to do.[5] This evidence, the

[5] Petitioner's statement that "Faust worked less than 25 percent of his time on projects for which Respondent was not trained" (Br. 20) is somewhat misleading. Faust's deposition testimony indicated that he spent approximately 75% of his time doing installation work (C.A. App. 325a). Much of the remainder of his time was spent writing reports of installations – a type of work that had been done by all installation specialists, including respondent (*id.* at 326a). In addition, Faust did "some gofer work like getting drawings out to the works, to salesmen" (*ibid.*). Faust indicated that he spent only a small percentage of his time on his remaining duties, which included filing and "working on margins" (*id.* at 325a, 326a). The record therefore suggests that Faust devoted a fairly small amount of time to duties for which his special skills were relevant. Exactly how much of his time was spent on those duties is unclear; the record shows only that it was considerably less than 25% but greater than zero. A more accurate assessment of how much time Faust actually spent working on margins or other tasks that respondent was not trained to do is a key unresolved issue of material fact that could be addressed at trial.

court found, "is inconsistent with [petitioner's] expressed need for diverse skills" and therefore "raises a question of fact as to whether [petitioner] really believed that Faust's 'varied' experience made him more qualified than [respondent]" (*id.* at 5a). The court accordingly concluded that evidence of the duties actually performed by Faust could lead a jury to "find [petitioner's] asserted reason for preferring Faust to be pretextual" (*ibid.*).

The court of appeals thus reasoned, sensibly enough, that an examination of the duties an employer actually assigns to its employee may shed light on the employer's motivation in recalling that employee. Because petitioner did not (for the most part) assign Faust duties that called for use of his experience as a sales correspondent, the court concluded that a jury might find petitioner to be dissembling when it stated that Faust's training in that area was the reason for his recall. In the language of *Burdine*, then, the court of appeals held only that the question whether "[petitioner's] proffered explanation is unworthy of credence" (450 U.S. at 256) should be put to the jury. Of course, it is possible to challenge the court of appeals' assessment of the facts of record; it is arguable that respondent's evidence – which did not refute the contention that petitioner used Faust's office skills at least some of the time – was not sufficiently probative to raise real doubts about petitioner's veracity. But that sort of assessment of the record is one that this Court typically leaves for the lower courts. See generally *Celotex Corp.* v. *Catrett*, 477 U.S. 317, 327 (1986).[6] There is no special reason to depart from that practice here, and that should be the end of this case.

[6] This is not a case where the court of appeals set aside the district court's factual findings. The district court did not determine that an

2. Petitioner nevertheless makes two arguments relating to the ADEA in challenging the decision below. Petitioner asserts, first, that the evidence used by a plaintiff at the third *McDonnell Douglas* stage to disprove an employer's proffered nondiscriminatory explanation for its action must *itself* tend to establish discrimination; it is not enough, petitioner asserts, for the plaintiff to show only that the employer's stated explanation was not believable. Second, petitioner asserts that respondent's evidence of pretext in this case—evidence of the duties petitioner assigned to Faust after he was recalled—may not be taken into account because that evidence somehow involves a consideration of petitioner's business judgment. Neither of these arguments has merit.

a. The precise contours of petitioner's first argument (Pet. Br. 12-18)) are hazy. Petitioner recognizes that, even at the third *McDonnell Douglas* stage, an ADEA plaintiff "need not produce direct evidence of discriminatory intent" (Br. 14), and this observation plainly is correct. See *Aikens*, 460 U.S. at 714 n.3; *Teamsters* v. *United States*, 431 U.S. 324, 358 n.44 (1977). At the same time, however, petitioner nevertheless seems to assert (Br. 15-16) that the evidence used to establish pretext must itself tend to prove discrimination. Petitioner therefore appears to believe (see *id.* at 17) that evidence showing only that the employer's stated rationale is not its real rationale—rather than affirmatively showing that the real rationale is discrimination—cannot be used to establish pretext. Evidence that is itself probative of discrimination, petitioner concludes, must be offered at the third *McDonnell Douglas* stage "to forge [a] link between the challenged decision and age discrimination" (Br. 18).

inference of pretext on the part of petitioner could not reasonably be drawn from respondent's evidence about Faust's actual post-recall duties. Instead, the district court awarded petitioner summary judgment because, even in light of respondent's evidence, petitioner's proffered explanation remained "plausible" (Pet. App. 17a). As the court of appeals explained, however, at the summary judgment stage "[t]he question is not whether the employer's asserted reason is plausible, but whether there is also evidence of record which, if credited, could render the reason implausible" (*id.* at 5a-6a). See *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986); pages 17-20, *infra*. The court of appeals found such evidence here (Pet. App. 5a, 6a).

This argument, in our view, amounts to little more than an oblique attack on established Title VII doctrine. Petitioner's assertion that direct evidence of discrimination must come into the case at the third *McDonnell Douglas* stage is simply inconsistent with the Court's observation in *Burdine* that a plaintiff may establish pretext "indirectly by showing that the employer's proffered explanation is unworthy of credence" (450 U.S. at 256). See *Aikens*, 460 U.S. at 718 (Blackmun, J., concurring).[7] Moreover, the Court's observation in *Burdine* follows logically from the *McDonnell Douglas* framework. Evidence establishing a prima facie case under the ADEA, if unrebutted by the defendant, entitles the plaintiff to judgment on the merits. *Burdine*, 450 U.S. at 254. And if the plaintiff shows that the defendant's proffered explanation is a pretext, he should be left, at the very least, in the same position he would be in if he had established an unrebutted prima facie case. Cf. Fed. R. Evid. 301. Indeed, such a showing by the plaintiff should, if anything, strengthen his case, since a defendant who offers an unbelievable response to an accusation of discrimination is likely to have something to hide—something that,

[7] Of course, a plaintiff also may establish pretext by adducing direct evidence of discrimination. See *McDonnell Douglas*, 411 U.S. at 804-805.

in the context of an ADEA action, is likely to be improper animus.[8]

The nature of a prima facie case under the ADEA also points up a fundamental flaw in petitioner's reasoning: direct evidence of improper animus is *not* necessary to "forge [a] link between the challenged decision and age discrimination" (Pet. Br. 18) because such a link is already forged by the establishment of a prima facie case. The Court has recognized that "[t]here will seldom be 'eyewitness' testimony as to the employer's mental processes" (*Aikens*, 460 U.S. at 716). It therefore developed a framework that requires a plaintiff to "eliminate[ ] the most common nondiscriminatory reasons for the plaintiff's rejection" (*Burdine*, 450 U.S. at 254) by establishing the prima facie case. When the plaintiff makes out such a prima facie case, the Court reasoned, it is "more likely than not" that the defendant's action was the result of discrimination. *Furnco Constr. Corp.* v. *Waters*, 438 U.S. 567, 576, 577 (1978). See *Trans World Airlines* v. *Thurston*, 469 U.S. 111, 121 (1985). That is why establishment of the prima facie case "creates a presumption that the employer unlawfully discriminated against the employee" (*Burdine*, 450 U.S. at 254).[9]

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[8] It is possible that an employer might lie about its reasons for discharging an employee even when its real reason is not discriminatory animus. See, *e.g.*, *Dea* v. *Look*, 810 F.2d 12, 14-15 (1st Cir. 1987) (employee asserted that he was dismissed in an attempt to shift the blame for pilferage from superiors). If that real reason is established in the course of the plaintiff's attempt to show pretext, however, it will "merely provide another reason, totally unrelated to age, for [the employee's] discharge" (*id.* at 15), and it accordingly will defeat the plaintiff's case. If, on the other hand, the proffered reason for the employer's action is disproved while the real reason is not apparent from the record, the prima facie case that remains ought to go forward.

[9] So far as we are aware, the First Circuit is the only court that has expressed the view that a plaintiff must do more than demonstrate that the employer's proffered rationale is invalid, and it has done so only in dicta. See *Dea*, 810 F.2d at 14-15 (plaintiff himself supplied nondiscriminatory rationale for employer's action); *White* v. *Vathally*, 732 F.2d 1037, 1042-1043 (1st Cir.), cert. denied, 469 U.S. 933 (1984) (the defendant's "proffered explanation was not clearly 'unworthy of credence' "). Indeed, the First Circuit also has recognized that " '[a] weak correlation between the articulated criteria [for filling a job] and job performance may support an inference that the employer's proffered explanation was a pretext for illegal discrimination,' " although " 'it does not compel such an inference' " (732 F.2d at 1040 (citation omitted)).

Of course, "[a] satisfactory explanation by the defendant destroys the legally mandatory inference of discrimination arising from the plaintiff's initial evidence" (*Burdine*, 450 U.S. at 255 n.10). But that does not mean, as petitioner seems to assert (Br. 18), that the mere proffer of a legitimate reason for the defendant's action eliminates all evidence from the case on which the jury could base a finding of discrimination. Once the defendant proffers its explanation, the jury may look to the entire record, including the evidence that made up the prima facie case and "inferences properly drawn therefrom" (*Burdine*, 450 U.S. at 255 n.10), in order to determine whether the defendant's explanation is pretextual. "Indeed, there may be some cases where the plaintiff's initial evidence, combined with effective cross-examination of the defendant, will suffice to discredit the defendant's explanation." *Ibid.*[10] The evidence that established respondent's prima facie case here thus provides the link between discriminatory animus and petitioner's actions. If petitioner's proffered explanation is discredited, that link remains intact.

b. Petitioner's second argument under the ADEA—that the court of appeals somehow second-guessed petitioner's

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[10] This is not to say that every action in which a prima facie case is established should go to the jury: as we explain below (pages 19-20, *infra*), a district judge may grant summary judgment to the defendant if he concludes, after reviewing all of the evidence in the record, that a rational jury could not find the employer's proffered justification to be pretextual.

business judgment when it considered evidence of Faust's actual post-recall duties (Br. 19-20)—is grounded on a misstatement of the use to which that evidence was put. It is true, of course, that a plaintiff, to establish pretext at the third *McDonnell Douglas* stage, must do more than "show that the employer made an unwise business decision, or an unnecessary personnel move" (*Gray* v. *New England Tel. & Tel. Co.*, 792 F.2d 251, 255 (1st Cir. 1986)); "[t]he employer's stated legitimate reason must be reasonably articulated and nondiscriminatory, but does not have to be a reason that the judge or jurors would act on or approve." *Loeb* v. *Textron, Inc.*, 600 F.2d 1003, 1012 n.6 (1st Cir. 1979). See *Jorgensen* v. *Modern Woodmen of America*, 761 F.2d 502, 505 (8th Cir. 1985); *Parcinski* v. *Outlet Co.*, 673 F.2d 34, 37 (2d Cir. 1982), cert. denied, 459 U.S. 1103 (1983). Cf. *Burdine*, 450 U.S. at 259. Here, however, respondent is not arguing that petitioner was *unwise* in thinking that it would need an employee with training as a sales correspondent; respondent instead wants to use Faust's post-recall duties as indirect evidence that petitioner *never* had any intention of using Faust as a sales correspondent.

Petitioner nevertheless seems to argue that evidence of actions taken by the employer after it made the challenged employment decision never may be used to establish pretext; if such evidence may be considered, petitioner argues, "an employer can never prevail on summary judgment * * * if it makes a less than perfect assessment of its future personnel needs" (Br. 20). This contention, however, ignores the " 'established judicial rule of evidence that testimony of prior or subsequent transactions, which for some reason are barred from forming the basis for a suit, may nevertheless be introduced if it tends reasonably to show the purpose and character of the particular transactions under scrutiny.' " *United Mine Workers* v. *Pennington*, 381 U.S. 657, 670 n.3 (1965) (quoting *Federal Trade Comm'n* v.

Cement Institute, 333 U.S. 683, 705 (1948)). Moreover, petitioner's fears are overstated, since the strength of the inference of pretext that may be drawn from the employer's conduct will vary from case to case.[11] At the same time, petitioner's approach would have a perverse effect of its own: it would entitle an employer to summary judgment whenever the employer is able to articulate any reason for the challenged decision that hinges on the employer's future plans or expectations.

An extreme hypothetical case makes this clear. An employer might contend, for example, that it retained a younger employee rather than an older one because the younger employee had training as a scuba diver; the employer might justify this action with the explanation that at the time it made this decision it intended to begin operating an underwater salvage service. Under petitioner's approach, the judge and jury would not be allowed to consider evidence that the employer never began operating such a service—and that the younger employee never used his scuba skills—in determining whether the employer's rationale was a pretext (see Br. 23). But an employer's actual conduct surely sheds at least some light on its past intentions. So long as the judge and jurors are aware that their "focus is to be on the employer's motivation * * * and not on its business judgment" (*Loeb*, 600 F.2d at 1012 n.6), there is no reason to deny them use of this sort of highly probative evidence.

3. Finally, petitioner contends (Br. 21-26) that the court of appeals departed from the summary judgment standards set out in Fed. R. Civ. P. 56. This contention again turns on a misstatement of the holding below. Rule 56 requires the entry of summary judgment "against a party who fails

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[11] Indeed, as we suggest above, in our view it is a close question whether the courts below would have been justified in awarding summary judgment to petitioner on the facts of this case.

to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial" (*Celotex Corp.*, 477 U.S. at 322). Here, the court of appeals found that respondent made the showing necessary to survive petitioner's summary judgment motion by making out a prima facie case of discrimination and by introducing evidence that "raises a question of fact as to whether [petitioner] really believed that Faust's 'varied' experience made him more qualified than [respondent]" (Pet. App. 5a; see *id.* at 6a (evidence "could cast doubt on [petitioner's] assertion that Faust was retained because of his more diverse skills")). In the court of appeals' view, petitioner therefore advanced facts (those making up its prima facie case) that would (in the absence of a legitimate, nondiscriminatory explanation) justify a jury in finding discrimination, as well as evidence that could lead a rational jury to reject petitioner's proffered explanation as a pretext—evidence, in other words, that could lead a jury to find for respondent on every element essential to his case.

The court of appeals thus did no more than follow this Court's admonition that "summary judgment will not lie if the dispute about a material fact is 'genuine,' that is, if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson* v. *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). Since "[c]redibility determinations, the weighing of evidence, and the drawing of inferences from the facts are jury functions, not those of a judge" (*id.* at 255)—and since "all justifiable inferences are to be drawn in [the nonmovant's] favor" on a motion for summary judgment (*ibid.*)—the court of appeals' approach was entirely proper, given its conclusion that the evidence raised doubts about petitioner's motivation.[12]

[12] Petitioner contends (Br. 22) that the court of appeals required it to disprove respondent's case. That is not correct: an examination of the court's opinion (Pet. App. 5a-6a) shows that the court found the crucial question to be whether respondent had produced "evidence of record which, if credited, could render [petitioner's explanation] implausible." Petitioner also contends (Br. 22-24) that there is no genuine issue of fact in dispute here because, in its view, "[w]hat Faust did after recall is immaterial to [petitioner's] intent when it decided—a year earlier—to retain a multi-skilled employee" (*id.* at 23). But this is simply a disagreement with the court of appeals' factual conclusions about the inferences that might reasonably be drawn from petitioner's conduct. Those inferences need not be compelling for the case to survive a motion for summary judgment: " 'the issue of material fact required by Rule 56(c) to be present to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial' " (*Anderson*, 477 U.S. at 248-249 (quoting *First Nat'l Bank* v. *Cities Service Co.*, 391 U.S. 253, 288-289 (1968)).

The conclusion that the decision below applied the proper legal standard under Rule 56 should not denigrate the value of summary judgment procedures in screening out nonmeritorious claims prior to trial. A plaintiff in an ADEA action is obligated to oppose the defendant's motion for summary judgment with something more than a self-serving assertion that the defendant's proffered explanation is a pretext (see, *e.g.*, *Dale* v. *Chicago Tribune Co.*, 797 F.2d 458, 464-465 (7th Cir. 1986), cert. denied, 479 U.S. 1066 (1987)). He "must do more than simply show that there is some metaphysical doubt as to the material facts. * * * Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.' " *Matsushita Electric Industrial Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 586-587 (1986) (citation omitted). But respondent, in the view of the court of appeals, made the necessary showing by establishing that petitioner's actions were (at least in large part) incon-

sistent with its proffered explanation of its decision to recall Faust. Whatever the merits of the court's assessment of the record, its legal analysis was entirely sound.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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